Supreme Court of the United States

OCTOBER TERM, 1948.

No. 401.

CITY BANK FARMERS TRUST COMPANY, as ancillary executor of the last will and testament of Edwin Prestage, deceased, and as trustee under an agreement made by said deceased dated July 31, 1939,

Petitioner,

v.

WILLIAM J. PEDRICK, United States Collector of Internal Revenue for the Second District of New York,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF OF PETITIONER.

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1. The government says (p. 8) that Section 863(b) "contemplates a direct debtor-creditor relationship between the bank and the alien". But that view was refuted by the Tax Court in *Estate of Karl Weiss,* 6 T. C. 227, 229 (acquiesced in by the Commissioner, C. B. 1946-2, p. 5), as follows:

> "Congress did not describe the deposit as one in the name of the decedent or one made directly by him, *nor did it mention a direct contractual relationship between him and the bank.*" (Italics ours.)

As shown in our supporting brief, Section 863(b) applies not only to bank deposits of the decedent, but also to those that are *for his benefit.*

2. The government states in its brief (p. 5):

> "The instant case presents only the question whether *the decedent's interest in the trust* should have been excluded from his estate under Section 863(b) of the Internal Revenue Code by reason of the fact that the corpus consisted of a bank deposit." (Italics ours.)

But the tax is *not* imposed in respect of "the decedent's interest in the trust"; it is imposed in respect of the *whole* trust corpus. The trust is disregarded for purposes of the tax and the specific items of property constituting the corpus are *deemed* to be owned by the deceased.

Included among those items of property in the instant case, there was concededly a *bank deposit.* For the purposes of the tax, *that* bank deposit is treated as if it were owned by the decedent at the time of his death. Now the only reason for so treating it, is in order to subject it to the same tax that would be imposed if the trust in question had not been created. *Helvering* v. *City Bank Co.,* 296 U. S. 85. But if the trust in question had not been created, the bank deposit concededly would be free from tax.

The decision below subjects to the tax property the ownership of which is *fictionally* attributed to the decedent by the statute merely to prevent the avoidance of the tax that would be payable if his ownership were real,—notwithstanding that such property would be free from tax if the decedent had not transferred it but had remained the actual owner thereof at the time of his death. Such result speaks for itself.

And yet, it is the supposed justification for our failing to perform our promise of tax immunity in accordance with the natural expectations of those to whom it was addressed and whose conduct it was designed to influence. The decision below thus lends itself to hostile propaganda against our government abroad, where it naturally will be viewed as reflecting on the sense of fairness of our government, and even its sincerity, in dealing with foreign peoples. In this critical period of our foreign relations (involving our moral leadership of foreign nations and their peoples) it is in the public interest, we submit, that a question of this international nature be reviewed and decided by this Court.

3. It is, of course, true, as the government asserts, that *Helvering* v. *City Bank Co.*, 296 U. S. 85, did not involve Section 863(b). But it did involve provisions similar to those under which the trust here in question has been subjected to tax (Internal Revenue Code Section 811(d), formerly Section 302(d) of the Revenue Act of 1926). In the *City Bank Co.* case this Court passed upon the scope and purpose of such provisions, and it held, in effect, that they were designed to put property that was held in a trust like the present, in the same position for tax purposes as if such property were owned by the deceased at the time of his death. This Court said at page 90:

> "Congress may adopt a measure reasonably calculated to prevent avoidance of a tax. The test of validity in respect of due process of law is whether the means adopted are appropriate to the end. A legislative declaration that a status of the taxpayer's creation shall, in the application of the tax, be deemed the equivalent of another

> status falling normally within the scope of the taxing power, if reasonably requisite to prevent evasion, does not take property without due process. But if the means are unnecessary or inappropriate to the proposed end, are unreasonably harsh or oppressive, when viewed in the light of the expected benefit, or arbitrarily ignore recognized rights to enjoy or to convey individual property, the guarantee of due process is infringed."

This Court further said at page 92:

> "There are however limits to the power of Congress to create a fictitious status under the guise of supposed necessity."

Obviously, the taxing of the bank deposit in the instant case is not "reasonably requisite to prevent evasion", *because there was no tax to evade.*

4. The exemption from federal estate tax involved in *Farmers' Loan and Trust Co.* v. *Bowers,* 22 F. (2d) 464, was conferred in respect of United States government bonds "beneficially owned" by a nonresident alien who is not engaged in business in the United States. The trust in the *Farmers' Loan and Trust Co.* case was practically the same as ours. It was held that the bonds were "beneficially owned" by the deceased and thus exempt from the tax. The government has acquiesced in that decision for over twenty years. Accordingly, it cannot fairly dispute that the bank deposit in the instant case was "beneficially owned" by the deceased. But, as pointed out in our main brief (pp. 12-14), Section 863(b) of the Internal Revenue Code applies to bank deposits that

are held *for the benefit* of the decedent, and we submit that, if anything, the scope of such a provision is even broader than the expression "beneficially owned".

5. It is hardly accurate for the government to say (p. 7) that the decision below "turns on the peculiar facts presented". The differentiation made below between a bank deposit of which the decedent was the actual owner (and which thus is included in his probate estate) and one of which he is merely deemed to be the owner for purposes of the tax (and is thus includible in the statutory estate for tax purposes), is a rule of general application. The decision does not turn on any "peculiar facts".

Respectfully submitted,

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